

No. 12411

United States
Court of Appeals
for the Ninth Circuit.

WALTER FRANCIS JOHN SHELLEY,

Petitioner,

vs.

UNITED STATES OF AMERICA RAILROAD
RETIREMENT BOARD,

Respondent.

Appendix to Brief of Respondent
(Excerpts from Transcript of Record)

Petition For Review of Decision of the
United States of America Railroad Retirement Board.

FILED

JUN 16 1950

PAUL P. O'BRIEN,
PAUL P. O'BRIEN
CLERK

No. 12411

United States
Court of Appeals
for the Ninth Circuit.

WALTER FRANCIS JOHN SHELLEY,

Petitioner,

vs.

UNITED STATES OF AMERICA RAILROAD
RETIREMENT BOARD,

Respondent.

Appendix to Brief of Respondent
(Excerpts from Transcript of Record)

Petition For Review of Decision of the
United States of America Railroad Retirement Board.

258 North Avenue 49
Los Angeles, Cal.
November 14, 1936;

The United States Railroad Retirement Board
Washington D. C.

Gentlemen:—

* * *

They turned me off in 1931, after promising me that when times improved, I would be reemployed and allowed all my seniority rights. This they have never done, always saying that either I was too slow, or there was no place where I could be used. They expected me to turn out as many bills on the typewriter as men 30 years my junior could turn out. I made on an average about 390 in the eight hours, but nothing satisfies this corporation.

* * *

/s/ W. FRANK SHELLEY.

Los Angeles, Cal.
December 8th, 1936;

The Railroad Retirement Board,
Washington, D. C.

Gentlemen:—

* * *

I put in 34 years in the service of the Southern Pacific, giving them the very best years of my life. Then, when I was injured in their service, and could not work as fast as younger men, they laid me off, promising me to be called for duty,

which I have always been willing and anxious to respond to, but which they always claimed there were no vacancies as yet.

* * *

The letter of Mr. Paul Shoup, President of the S. P. shows how they deceived me, he "hoping I would soon be back on the job etc." which they never had any true intention of doing. No wonder people hate railroads for their treatment of their employees.

Yours respectfully,

/s/ W. FRANK J. SHELLEY.

Paul Shoup
President.

Southern Pacific Company
65 Market St. San Francisco

June 26, 1931;

Mr. W. Frank Shelley
258 N. Ave 49 Los Angeles
Dear Mr. Shelley:

* * *

It has since developed that a man with greater seniority than yours has exercised his choice on the position formerly assigned to you, which has resulted in placing you on our laid-off list. Under these circumstances, therefore, it has been necessary for us to cancel the annual Pass which you have held as Agent.

* * *

With reference to your company Life Insurance, I regret also that there is no way in which we can take care of this feature for you.

APPLICATION FOR ANNUITY

Date Signed January 7, 1937.

.7. Are you now actually working for a railroad or other carrier? Have no employment.

8. If not, give the date you last worked. S. U. Frt. Station Los Angeles 1932;

/s/ WALTER F. J. SHELLEY.

Officially Filed Jan. 11, 1937. Railroad Retirement Board.

1. Name of RR or other Carrier:

Southern Pacific Company:

2. Last occupation Stenographer & Typist:

Date began svc. 1930.

3. Dept. opn Freight House SP Co

Los Angeles, Cal.

Date ended service 1932.

4. Exact name on pay roll W. F. Shelley.

I had to lay off few days account slight sickness.

When I wanted to come back, they said I was too slow on the typewriter, and then said another man had bid in my place who had more seniority on the Clerks Seniority list.

I made 380 bills a day, but this was "too slow," and at my age after giving the Southern Pacific practically all my life's service, 40 years service to them, they evaded, and side stepped, and did not put me back to work, but left me to starve for all they cared, but said when times got better I would be sent for. They never sent.

They cancelled my Annual Pass; my Insurance; and all my rights, although I had many years Seniority on the Order of Railroad Telegraphers List, which Union I was member in good standing. I also joined the Brotherhood of Railroad Clerks, and was in good standing there.

* * *

/s/ WALTER F. J. SHELLEY.

Questionnaire

1. (a) Have you worked for a railroad or other carrier since August 28, 1935 and received pay for such work?—(a) No.
2. If you have not worked for a railroad or other carrier for pay since August 28, 1935:
 - (a) Reason for your being on leave or furlough.—(a) S.P. would not give me work.
 - (b) If not on leave or furlough, what has been your relation to your former employer since August 28, 1935?—(b) On leave.
 - (c) On what date did you last work for a railroad or other carrier for pay?—(c) Fall of 1931 or 32.

3. (a) Have employees junior to you on the same roster or district worked since August 28, 1935?—(a) Yes indeed.
(b) If so, why have you not worked?—(b) S.P. thought me too old.

February 9th 1937.

/s/ WALTER FRANCIS JOHN
SHELLEY.

Form ERR-7

RAILROAD RETIREMENT BOARD

A-38554

Name of applicant Walter Francis Shelly.

Address 3753 Hellman Ave., Los Angeles, California.

Last Occupation Clerk.

Department of Division Los Angeles.

Name of Carrier Southern Pacific Company.

Was the above-named applicant On August 29, 1935,

(1) On furlough? No.

(2) On leave of absence? No.

(3) Absent on account of sickness or disability?

No.

(4) Was he subject to call for service? No.

(6) What roster? Dropped after six months.

Remarks: Lost rights to return to service after being off six months. Last compensated service performed November 25, 1930.

I certify that the answers to the foregoing questions are true and correct to the best of my knowledge and belief.

Date November 22, 1937.

/s/ J. S. CUNNINGHAM,
Secretary Board of Pensions.

258 North Avenue 49
Los Angeles, Cal.
January 28th, 1938

Mr. M. M. Wiggins,
Railroad Retirement Board,
Washington, D. C.

Dear Mr. Wiggins:

It seems extremely cruel to think that a man who has given the very best part of his life to a railroad should be deprived when he has grown old from any Pension because he is not in the service of a Carrier, however, one has to do the best possible under the circumstances.

If I went back to service for the Nevada Copper Belt Railroad, would this aid me in my quest for an annuity. I have in mind that the N.C.B. operates only in Nevada, so would appreciate it if you would kindly ascertain and advise me, as I have been unable to get on with my old employers the S.P. Railroad, and I think I can obtain work with

the N.C.B. and be called back, but don't want to do it if, it would be of no avail. Would the fact that it was not "Inter-State" make the service of no avail—

I feel determined to force my petition, and get my friends in Washington to help, if it be necessary, as I certainly worked fully 41 years, and I think a few years over that amount of time. I would appreciate it very much if you would mind finding out and advising me if I have put in sufficient time on the RR per your investigation of my application?

Thanking you for your kindly help to me, believe

Yours very truly,

/s/ WALTER F. J. SHELLEY.

VIRGINIA & TRUCKEE RAILWAY

Traffic Department

Carson City, Nevada

May 4, 1938.

M. E. Lynch Esq.,
Railroad Retirement Board.
Washington D. C.

Claim A-58554

My Dear Sir:—

I am pleased to advise that I have at last secured employment with the above named Railroad Company, and do Accounting work in the General

Office and auditing, as well as a little telegraphing, and some Shorthand work. I worked last month, and intend to stay if I can.

* * *

I claim I was in the service of the S.P. Company on August 29th, 1935 because I never resigned; tried continually to get back to work; was asked to resign saying there would be no work, but always refused, and said I was ready and willing to work, and would maintain this status. I am the subject of a conspiracy gotten up by a Jewish Assistant Superintendent who, by reason of jealousy, did his utmost to try and get me out of the service. He died a year or so ago, and he has gone to answer for the deeds done in the body to myself and many others, for he was the cruelest man ever on the Salt Lake Division of the Southern Pacific.

I constantly asked for work, and was always informed that "There's no chance; lots of men with more seniority—can't do anything for you."

I was "bumped" by a man with more seniority in 1933, and I never resigned, nor can the S.P. produce any resignation from me from the S.P. at Los Angeles, and they know it.

* * *

Yours respectfully;

/s/ WALTER F. J. SHELLEY,
Sometimes called "Frank
Shelley."

SOUTHERN PACIFIC COMPANY

San Pedro, Calif.

May 6, 1938.

File 534.

Subject: Personal Records.

Mr. W. F. Shelley,
Carson City, Nev.

Dear Sir:

Refers to yours of May 2nd asking us to look thru records and notify you the years you were agent of the Southern Pacific, at Fifth Street, San Pedro.

Please be advised that since 1929 all the roads operating into the Harbor were consolidated and placed under the jurisdiction of the Harbor Belt Line Railroad and we are not in possession of personal records of employees at this point prior to that time.

Would suggest that you write to Mr. C. F. Donnatin, Supt. Southern Pacific at the Central Station, Los Angeles, who no doubt could furnish you information requested from his records.

Yours truly,
P. H. MANN,
Agent.

CMB:G

SOUTHERN PACIFIC COMPANY

65 Market Street, San Francisco, California

May 5, 1938

Mr. W. F. Shelley,
Carson City, Nevada.

Dear Mr. Shelley:

Referring to your letter to me of April 27 requesting that I furnish you information concerning your service record with SP Co:

Do not find that there is anything definite in my file concerning your complete service with this Company. As your personal record papers are on file in Superintendent Donnatin's office at Los Angeles, suggest that, if not already done, you call on him for such information.

Yours truly,
/s/ J. S. CUNNINGHAM.

SOUTHERN PACIFIC COMPANY

Los Angeles, California

May 10, 1938

Mr. W. Frank Shelley,
Carson City, Nevada.

Dear Sir:

Your letter of April 27 with reference to service record:

First record in this office is that filed by you on the Salt Lake Division, June 1, 1899, in which you

give reference to previous service with this company from 1893 to 1894 as clerk and stenographer under A. D. Wilder, at Oakland Pier, leaving this position to go to Tucson for employment under J. S. Noble as stenographer and operator. You show employment thereat commencing in 1894 but do not show date of leaving, although you do show that you left Tucson for the purpose of entering college. Record shows following additional service:

January 1, 1899, to October 25, 1907, operator, Salt Lake Division; and clerk, Tucson Division; resigned.

October, 1917, to October, 1919, agent-operator, San Joaquin Division; resigned.

January, 1920, to August, 1927, agent-operator, Salt Lake Division; transferred to Los Angeles Division.

August, 1927, to December, 1930, agent-operator and station clerk, Los Angeles Division.

Yours truly,
/s/ C. F. DONNATIN.

This letter shows 21 years 10 months service.

ERR-8-a

Adopted Apr. '38

Railroad Retirement Board
Claims Service

Employment Relation Questionnaire

(To be executed where the Form AA-2 shows that the employee failed to receive compensation in any of four consecutive months including August, 1935, where compensation was received in more than half of the months in the two years preceding the beginning of the absence, where the personnel record as reported in Section 2 of the Form AA-2 shows no break in the service, where the employee, at the end of the absence, returned to the same class of service as that in which he was previously engaged, and where there is a rule or practice established on the carrier by which employees under these circumstances could maintain an employment relation.)

Applicant: Walter F. J. Shelly A-38554

Employer: Southern Pacific Co.

Department and Division: Operating

Last Occupation prior to August 29, 1935: Clerk

1. On August 29, 1935, was applicant recorded as (a) on furlough? No. (b) On leave of absence? No. (c) Absent on account of sickness or disability? No. (d) If negative answers are made to (a), (b) and (c), state date and cause of separation from service. 5-25-31, 6 month furlough rule.

2. (a) Was the applicant's name on a seniority roster on August 29, 1935, in accordance with an applicable rule governing employees of his class?....
(b) Specify roster and date thereof.....

Remarks: Rule 41 Summary 7-1-4.

Oct. 6, 1938:

(Date)

/s/ J. R. DUCK,
Adj.

Form ERR-9

Findings of Fact and Conclusions of Law
with Respect to the Existence of an Employment
Relation between applicant, Walter J. F. Shelly,
A-38554, and Virginia & Truckee Ry. on August 29,
1935.

I have examined with care the statement of facts
on Form ERR-8 and have compared those state-
ments with all the other relevant data, if any, in file
and find them to be correct according to the weight
of the available evidence. Such statement hereby
constitutes my findings of fact with respect to the
claim of the applicant to an employment relation,
within the meaning of the Railroad Retirement Act
of 1937, after August 29, 1935.

Based on these findings of fact, I conclude that
the applicant had an employment relation within

the meaning of the Railroad Retirement Act of 1937,
after August 29, 1935.

[Longhand note]: Subsequent service only.

Oct. 6, 1938.

(Date)

/s/ J. R. DUCK,
Adjudicator.

Oct. 8, 1938.

(Date)

/s/ THOS. A. McFARLAND,
Reviewer.

258 N. Avenue 49
Los Angeles, Cal. 11/5/38

Mr. M. E. Lynch,
Claims Service RR Ret. Bd.
Washington.

* * *

When I returned to Los Angeles, I was given a position in the Los Angeles Freight station where I was until the height of the depression of 1932, and about October that year I was laid off, but I never resigned and the S. P. Company know very well I never did, and they had no resignation until I resigned this year, Jan. 1st, 1938. After I was laid off in Oct. 1932, I made it my business to regularly go around and try to get on, but my Foreman, Mr. B. J. Van Slyck, always advised me there was no work they could give me to do. I was always

ready, and always willing to work. I could find dozens of Railroad men who would gladly testify in my behalf to this effect.

* * *

/s/ WALTER J. F. SHELLEY.

Dec. 9, 1938

Mr. Walter F. J. Shelley
258 North Avenue 49
Los Angeles, California

Dear Sir:

* * *

Our investigation develops that you did not, on August 29, 1935, enjoy an employment relation with the Southern Pacific Company solely because you were, on November 25, 1930, furloughed, and, in accordance with the Clerk's Schedule, Rule No. 4, automatically separated from service on May 25, 1931, at the expiration of six months.

Since it has been definitely established that no employment relation existed with the Southern Pacific Company on August 29, 1935, the portion of Section 3(b)2 of the Railroad Retirement Act of 1937 which reads in part:

“In all other cases, (referring to applicants who did not have an employment relationship on August 29, 1935), the years of service shall include only the service subsequent to December 31, 1936.”

will necessarily apply and, in your case, it will only

be possible to credit you with service performed subsequent to that date.

* * *

P. F. MURPHY.

Nov. 8, 1939

Mr. Walter F. J. Shelley
258 North Avenue, 49
Los Angeles, California

In reply refer to:
R.R.B. No. A-38554

Dear Sir:

Receipt is acknowledged of your letter of October 27, 1939.

You are hereby informed that your claim has been reopened in order that further investigation and development may be made.

You will be promptly informed of the decision of the Retirement Claims on reconsideration, which will be mailed to your address then of record. In the meantime, you are requested to submit any additional material evidence relating to the question at issue.

The decision on reconsideration will constitute the initial decision of the Retirement Claims and, in event you desire to do so, you may appeal such decision within one year from date of notice thereof.

Very truly yours,

/s/ M. E. LYNCH,

Director of Retirement Claims.

Mr. Walter Francis John Shelley
258 North Avenue 49
Los Angeles, California

Dear Sir:

Your letter of November 13, 1939, addressed to Mr. M. E. Lynch in which you state that you have decided to take your case to the Federal Court has been referred to me for reply.

Your case is now before the Claims Service of the Board where it is receiving careful and impartial attention and I have for that reason not gone into the merits of it. The purpose of this letter is not to discuss the issues involved but to point out to you that under the sections of the law quoted in your letter the right of any person aggrieved by any decision or action of the Board to apply to the Federal Court for relief arises only after the Board has made a decision. A decision of the Claims Service is not a decision of the Board; nor is a decision of the Appeals Council a decision of the Board. If an individual is aggrieved by any decision of the Claims Service he may appeal to the Appeals Council of the Board within one year from the date of such decision and if he is also aggrieved by the decision of the Appeals Council he may then appeal directly to the Board within four months from the date of that decision. If the individual is still aggrieved by the decision of the Board then and only then may he apply to the proper Federal District Court. It is thus necessary to exhaust first all the remedies provided for him within the Board

itself before an individual aggrieved may apply to the Federal Court.

I am enclosing for your information a copy of the part of the Regulations governing appeals within the Board.

Very truly yours,

LESTER P. SCHOENE,

General Counsel.

Form ERR-8

Rev. Jan. '39

Railroad Retirement Board

Claims Service

Employment Relation Questionnaire

S. S. Acct. No.

(To be executed where the individual was not
in compensated service on August 29, 1935.)

Name of Individual: Walter Francis Shelley

A-.....

Address:

Employer: Southern Pacific Company

Department: Operating

Location or Division: Los Angeles Division

Last occupation prior to August 29, 1935: Auto
messenger

Last Day Worked prior to August 29, 1935: No-
vember 24, 1930

1. On August 29, 1935, was the individual recorded as:

- (a) On furlough on account of reduction in force? No.
- (b) On leave of absence? No.
- (c) Absent on account of sickness or disability? No.
- (d) If absent on account of sickness or disability, was leave of absence required?
- (e) If required and not granted, explain fully...
- (f) If negative answers are made to (a), (b) and (c), state date: November 25, 1930; and cause of separation from service with reference to rule or practice in accordance with which the individual's service was terminated: laid off account reduction in force, seniority rights to continue 6 months under agreement with the BofRC.

Note: If answers to questions (a), (b) and (c) are all in the negative, the date in (f) should be prior to August 29, 1935, and the following questions need not be answered.

* * *

Execute Part I, II, or III, Depending Upon the Status of the Individual on August 29, 1935

I. Where the Individual was Recorded as Being on August 29, 1935, on Furlough:

- (a) Class or craft from which furloughed: Clerk
- (b) Date of last furlough prior to August 29, 1935: November 25, 1930
- (c) Was he subject to call for service? For 6 months only, when seniority expired.

(d) Date called: Not called.

Did he report?

(e) If he did not report, give reason why

(f) Was he ready and willing to serve?

State basis for answer, as personal observation of immediate supervisor, medical or other reports, giving dates on which observations or reports were made: Unknown, when depression ended and positions reestablished he had no seniority and was engaged in outside employment.

* * *

Remarks: Mr. Shelley was not on the telegraphers seniority roster at time of his termination of service. In February, 1929, he transferred from the telegrapher-clerk seniority roster to the freight clerks roster and placed on that roster effective July 1, 1929. On July 1, 1930, his name did not appear on the roster of the telegraphers. On July 1, 1931, his name was dropped from the freight clerks roster account no service performed in past six months, this in accordance with clerks agreement.

Therefore, Mr. Shelley's name did not appear on any seniority roster of this company on August 29, 1935.

Dec. 12, 1939.

/s/ J. S. CUNNINGHAM,

Secretary, Board of Pensions.

The Order of Railroad Telegraphers
System Division No. 53

834 Pacific Building San Francisco, Calif.

November 30, 1939.

18-398

Mr. D. J. Russell, Supt.,
Southern Pacific Company,
Los Angeles, Calif.

Dear Sir:

Conversation with Miss Wolfe November 29th:

January 1st 1930 Telegraphers' Seniority list
shows:—

171. Shelley, W. F. Agent Extra list Dec. 17, 1921

Mr. Shelley's name does not appear on the Official
Telegraphers' Seniority list issued July 1, 1930.

Yours very truly,

/s/ [Indistinguishable]

Local Chairman.

Form B—49a

A-38554

DISALLOWANCE MEMORANDUM

Name of applicant Walter Francis John Shelley.
This claim has been carefully reviewed and it has
been determined that the applicant is ineligible to
receive credit for prior service.

Other reasons: LWD for Southern Pacific prior
to 8-29-35 was 5-25-31 and lost rights at expiration

6 months furlough. Eligible for subsequent service only. Confirmation original decision.

We hereby certify that the facts as stated above are true and correct and in accordance with the rules and regulations promulgated by the Railroad Retirement Board.

/s/ O. E. HARRIS,
Adjudicator.

/s/ G. H. GENTRY,
Reviewer.

I, the undersigned, an officer of the Railroad Retirement Board, duly authorized to make decisions under section 10(b) 5 of the Railroad Retirement Act of 1937 on applications for annuities or death benefits, do hereby constitute in pursuance of such authority the foregoing statements as my decision of fact and law.

/s/ THOS. A. McFARLAND,
Supervisor.

Approved Dec. 28, 1939.

Jan. 2, 1940.

Mr. Walter Francis John Shelley
258 North Avenue 49
Los Angeles, California

In reply refer to
R.R.B. No. A-38554

Dear Sir:

Further reference is made to your Application No. A-38554 for an annuity.

To be eligible to receive an annuity under the Railroad Retirement Act of 1937 based in whole or in part on service rendered prior to January 1, 1937, an individual must qualify by having been in the compensated service of an employer as defined in the Act or by having been in an employment relation to such an employer on August 29, 1935.

An employment relation can exist only if there was at the time in question in effect on the employer an established rule or practice in accordance with which the individual was either on furlough, subject to call for service and ready and willing to serve, or on leave of absence or absent on account of sickness or disability, all in accordance with the established rules and practices in effect on the employer.

Inasmuch as the carrier record shows you did not enjoy an employment relation on August 29, 1935, any annuity which you may be entitled to receive is based on service subsequent to January 1, 1937.

It is regretted we had no alternative other than to declare that you are not entitled to receive an annuity based on service performed prior to January 1, 1937.

If, after reading this letter, you are dissatisfied with the decision of the Claims Service, you are privileged to appeal therefrom within one year from the date of this letter by requesting appeal forms and following the procedure as outlined on the reverse side of this letter.

Very truly yours,

/s/ O. E. HARRIS.

H. SORENSEN,

Director of Retirement
Claims.

APPEAL FROM INITIAL DECISION OF THE CLAIMS SERVICE OR DIVISION OF RE- TIREMENT CLAIMS

The Claims Service of the Retirement Board has proceeded upon a wrong theory, to-wit that I "left" the service of the Southern Pacific RR in 1933, when "laid off" due to the depression. The facts are, that I did not so leave its employment, but was informed at the time, by the Foreman over me, Mr. B. J. Van Slyck that, owing to the depression, a reduction of the force had been ordered, and that I, with others, must be "laid off temporarily", and I need not worry, the lay-off was only temporary,

and until such time as business improved, when I would be given back my old place. I was told by Mr. Van Slyck, my Foreman, to come around frequently, and report for work, which instructions I complied with, coming to the Office time after time, month after month, up until 1937, at which time I made a formal complaint to my Superintendent, Mr. C. F. Donnatin, who expressed his sympathy, and stated he would write the Vice-President and try to get me placed back in my old position, or some other place in the Office. That shortly thereafter, Mr. Donnatin wrote me, copy attached, that he had been unable to obtain the premission asked, and that nothing therefore could be done.

The fact of my reporting in person, month after month, became common knowledge among fellow employees, and can be readily established.

Section 288A Sec. B of the 1937 Act states:

“An Individual Is in the Employment Relation to An Employer, If He Is on Furlough, Subject to Call, Within or Outside of the United States, and Ready and Willing to Serve.”

/s/ WALTER F. J. SHELLEY.

* * *

I determined to get employment, and when the S.P. Railroad would not put me back to work, I went to Nevada, and the Virginia and Truckee were glad to secure my services. This was a "re-employment," it is true, but it was upon efficiency and merit, and I am entitled to my Pension.

/s/ WALTER FRANCIS JOHN
SHELLEY,

Known as "Frank Shelley".

DECISION OF THE APPEALS COUNCIL

Decision No. 1623
Appeal No. 1992
R.R.B. No. A-38554.

Mr. Walter Francis John Shelley
258 North Avenue 49
Los Angeles, California.

September 29, 1941.

The applicant filed an application for an annuity on January 11, 1937, and claimed an employment relation with the Southern Pacific Company. Under date of September 30, 1939, he was advised by the Division of Retirement Claims that he had been awarded an annuity based on service performed subsequent to December 31, 1936. He was advised by the Division of Retirement Claims under date of January 2, 1940, that he was not eligible to receive an annuity based on service rendered prior to January 1, 1937, because he was not an "em-

ployee" on August 29, 1935, the enactment date of the Railroad Retirement Acts, as claimed. On December 2, 1940, he filed an appeal from that decision.

Facts:

In his application, the applicant claimed to have been born May 24, 1870. He later advised that his correct date of birth was May 24, 1873, which birth date has been verified. In his application, he stated that he last worked for the Southern Pacific Company in 1932 as stenographer-typist.

The secretary of the Board of Pensions of the Southern Pacific Company reported to the Board on R.R.B. Form ERR-7 dated November 22, 1937, that the applicant last worked as a clerk, and that on August 29, 1935, he was not on furlough, not on leave of absence, nor absent on account of sickness or disability. The secretary of the Board of Pensions further advised that the applicant lost his rights to return to service after the expiration of six months from the date on which he was laid off and that his last compensated service was performed November 25, 1930.

On June 22, 1938, the applicant filed another application in which he stated that he last worked for the Virginia and Truckee Railway Company on June 2, 1938.

Under date of July 25, 1938, the applicant was informed by the Claims Service (now the Division of Retirement Claims) that he was not eligible to receive an annuity under the Railroad Retirement

Acts, based on service performed by him prior to January 1, 1937, because he did not have an employment relation, within the meaning of the Railroad Retirement Acts and the Board's regulations, with the Southern Pacific Company on August 29, 1935.

The applicant protested this decision, contending that he was a telegrapher at Ventura, California, and agent at Los Angeles, California, in 1930 for the Southern Pacific Company. The applicant was advised by the Division of Retirement Claims on November 8, 1939, that his claim had been reopened in order that a further investigation might be made.

In response to a request for additional information, the secretary of the Board of Pensions of the Southern Pacific Company reported to the Board on R.R.B. Form ERR-8 signed December 12, 1939, that the applicant last worked as auto messenger on November 24, 1930, at which time he was laid off on account of reduction in force and in accordance with the agreement with the Brotherhood of Railway Clerks he retained his seniority rights for six months thereafter, and that when the depression ended and the positions were established, the applicant had no seniority and was engaged in outside employment. The secretary of the Board of Pensions further advised that:

"Mr. Shelley was not on the telegraphers seniority roster at time of his termination of services. In February, 1929, he transferred from the telegrapher-clerk seniority roster to

the freight clerks roster and placed on that roster effective July 1, 1929. On July 1, 1930, his name did not appear on the roster of the telegraphers. On July 1, 1931, his name was dropped from the freight clerks roster account no service performed in past six months, this accordance with clerks agreement.

"Therefore Mr. Shelley's name did not appear on any seniority roster of this company on August 29, 1935."

It has been determined by the Railroad Retirement Board that there was an agreement in effect February 1, 1922, revised January 1, 1924, and still in effect on August 29, 1935, on the Southern Pacific Company covering the applicant's class of employment (clerks), under the terms of which individuals who had been out of service because of a reduction in force for a period of six months were dropped from the roster and lost their seniority rights.

It has been determined by the Board that after he last worked for the Southern Pacific Company in 1930, the applicant rendered service for compensation in April, May, and June, 1938, to the Virginia and Truckee Railway Company which is a carrier subject to the Railroad Retirement Acts.

Under date of September 30, 1939, the applicant was informed by the Division of Retirement Claims that he had been awarded an annuity under the Railroad Retirement Act of 1937, based on service rendered by him to the Virginia and Truckee Railway Company in the months of April and May,

1938. The applicant's monthly annuity amounted to 17 cents and in accordance with Section 3 (i) of the Railroad Retirement Act of 1937, he was awarded the commuted value of his annuity, \$20.47.

The applicant contends that he never resigned from the service of the Southern Pacific Company and that he is entitled to larger annuity inasmuch as he has completed 44 years of service with carriers covered by the Acts.

Discussion:

The Southern Pacific Company has reported that prior to August 29, 1935, the applicant last worked for that company in November, 1930. Subsequent to November, 1930, the applicant was employed by the Virginia and Truckee Railway Company in the months of April, May and June, 1938.

In Section 204.02 (a) of the Board's regulations with respect to employment relation, it is provided that:

“An employment relation exists if there was, at the time in question, in effect on the employer an established rule or practice in accordance with which the individual was either (1) on furlough (subject to call for service and ready and willing to serve) or (2) on leave of absence, or (3) absent on account of sickness or disability.”

In Section 204.02 (b), it is provided that:

“A furlough, leave of absence, or absence on account of sickness or disability, within the

scope of these regulations or the Railroad Retirement Act of 1937, does not exist unless the terms of the established rule or practice in accordance with which the individual is out of active service are such that they would operate to restore him to active service upon the occurrence of definite and ascertainable events or conditions. * * *.”

(This section of the regulations is also applicable to the Railroad Retirement Act of 1935.)

Section 204.03 (b) provides that:

“Where the terms of a furlough, or the rules or practices under which it was issued, place a limitation on the time within which the furlough will operate to return an individual to active service, the employment relation ceases upon the expiration of such period, unless he has resumed active service within the period. * * *.”

The Southern Pacific Company has reported that the applicant transferred from the telegrapher-clerk roster to the freight clerk roster in February, 1929, that his name was placed on the freight clerks' roster effective July 1, 1929, and that on July 1, 1930, his name did not appear on the telegrapher-clerk's roster. Therefore, it is obvious that after the applicant transferred to the freight clerks' roster in February, 1929, the company considered that he no longer maintained rights as a telegrapher.

The Southern Pacific Company has reported that the applicant last worked in November, 1930, as auto messenger, at which time he was laid off on account of reduction in force. Under the terms of the agreement in effect at the time the applicant last worked for the railway company, employees of the applicant's class, who had been out of service because of reduction in force for a period of six months, were dropped from the roster and lost their seniority rights. The railway company has reported to the Board that the applicant did not reenter service within six months and under the terms of the agreement he lost his seniority rights. The applicant contends that he never resigned from the service of the railway company. However, the railway company has reported that the applicant last worked in November, 1930, that his rights were automatically terminated in July, 1931, when his name was dropped from the freight clerks' roster in accordance with the clerks' agreement which was in effect at the time he ceased active service, and that thereafter he was no longer considered to be an employee of the company. In accordance with Section 204.03 (b) of the Board's regulations, the applicant's employment relation terminated at the expiration of the six months after he was laid off. He was not thereafter considered to be an employee of the railroad company and there was not thereafter any established rule or practice in effect on the railroad company which would have operated to restore the applicant to active service upon the occurrence of

any definite and ascertainable events or conditions. Therefore, the applicant did not have an employment relation, within the meaning of the Railroad Retirement Acts and the Board's regulations, with the Southern Pacific Company on or after August 29, 1935.

Section 202 of the Railroad Retirement Act of 1937 provides:

"The claims of individuals (and the claims of spouses and next of kin of such individuals) who, prior to the date of the enactment of this Act, relinquished all rights to return to the service of a carrier as defined in the Railroad Retirement Act of 1935 or ceased to be employee representatives as defined therein, and became eligible for annuities under such Act, shall be adjudicated by the Board in the same manner and with the same effect as if this Act had not been enacted. * * *."

The 1937 Act became a law on June 24, 1937, and became applicable to all cases other than those specified by Section 202. On and after August 29, 1935, and prior to June 24, 1937, the applicant did not qualify as an employee, and, consequently, prior to June 24, 1937, he was not eligible to receive an annuity under the Railroad Retirement Act of 1935. This claim must, therefore, be adjudicated in accordance with the provisions of the Railroad Retirement Act of 1937.

In Section 3 (b) of the 1937 Act, the method to

be used in determining the years of service on which an annuity shall be based is defined in subsection (1), as follows:

“In the case of an individual who was an employee on the enactment date, the years of service shall include all his service subsequent to December 31, 1936, and if the total number of such years is less than thirty, then the years of service shall also include his service prior to January 1, 1937, but not so as to make his total years of service exceed thirty: * * *.”

Subsection (2) of Section 3 (b) provides that:

“In all other cases, the years of service shall include only the service subsequent to December 31, 1936.”

Subsection (4) of Section 3 (b) provides that:

“In no case shall the years of service include any service rendered after June 30, 1937, by an individual who is sixty-five years of age or over, except for the purpose of computing his monthly compensation as provided in subsection (o) of this section.”

The provisions of the Railroad Retirement Act of 1937 thus require that to be eligible for an annuity based on service performed for a carrier prior to January 1, 1937, the person must have been an employee on August 29, 1935, the enactment date of the 1937 Act, by having been in the active service of or in an employment relation to an employer on that date. The applicant did not qualify as an em-

ployee on August 29, 1935; therefore, under the provisions of subsection (2) of Section 3 (b) of the 1937 Act, the "years of service" used in calculating any annuity to which the applicant may be entitled may not include any service performed by him prior to January 1, 1937. Since the applicant attained age 65 in May, 1938, any service performed by him subsequent thereto may not be included except for the purpose of determining his monthly compensation. The annuity which has been awarded the applicant was properly based only on service performed by him subsequent to December 31, 1936, and prior to the month following the month in which he attained age 65.

Conclusion:

The decision of the Division of Retirement Claims is sustained.

/s/ JASPER A. MILLER.

/s/ CHESTER C. THORPE.

/s/ MARTIN L. BUSHBLOW.

/s/ HOWARD J. SHEA.

/s/ FRANK H. WILLY.

Southern Pacific Company
(Pacific System)

Agreement Between
Southern Pacific Company
(Pacific System)
and

All that Class of Clerks and Other Office, Station
and Store Employees Represented by
the

Brotherhood of Railway and Steamship Clerks,
Freight Handlers, Express and Station Em-
ployees.

Effective February 1, 1922

(Revised to January 1, 1924)

Rule 41.

An employee whose position is abolished, or who is displaced under conditions not otherwise provided for in these rules, may within five (5) days (or if on leave of absence, within five (5) days from date of return) displace a junior em-
ployee.

When an employee is assigned to a temporary position he may, at the conclusion of such assign-
ment, either return to his former status, or dis-
place a junior employee who has bid in a position during his occupancy of such temporary position.

An employee laid off on account of reduction in force, or through displacement, shall have his name carried on the seniority roster without the status of an employee for six (6) months, and shall, if

available within a reasonable time, be given preference in the order of seniority over other applicants when force is increased, provided employing officer is currently advised of address.

Memorandum of Understanding

1. It is agreed between the Southern Pacific Company (Pacific Lines) and all that class of clerks and other office, station and store employees represented by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees that:
2. Employees coming within the scope of Clerks' Agreement who have been laid off subsequent to June 30, 1930, and prior to June 30, 1931, as a result of reduction in force, and who have complied with Rule 41 of the current Clerks' Agreement, and through the operation of the last paragraph of Rule 41 of said Agreement have lost or will lose their seniority prior to June 30, 1931, shall have their seniority carried on the seniority roster, without the status of an employee, until June 30, 1931.
3. It is understood that this extension to the provisions of Rule 41 is agreed to due to the unusual economic situation which has prevailed during the past few months, and that the arrange-

ment is not to be considered as establishing a precedent.

For the Southern Pacific Co.

(Pacific Lines.)

/s/ R. E. BEACH,

Supervisor of Wage
Schedules.

For the Brotherhood of Railway and Steamship
Clerks, Freight Handlers, Express and Sta-
tion Employees

/s/ E. A. McMILLAN,

General Chairman.

/s/ F. W. TENNEY,

General Secretary-Treasurer.

San Francisco, Calif.,

January 21, 1931.

Before the Railroad Retirement Board
Hon. Murray W. Latimer, Chairman.

Dear Mr. Latimer:

* * *

During the great depression of 1932 and 1933 when the Company reduced its Staffs, a great number of reductions were made in every department, and myself with others were laid off, but I was really eligible for Pension under the 1934 Act, having worked for 30 years but, being in good health, I was eager to continue working, and therefore applied constantly, asking to be reinstated.

As I had been in Official positions, I was hoping another such position, which I was competent to fill would be available, because I had taken great interest in the Company's affairs, and had enjoyed the work, and my health, even today is excellent, although I am 69 years of age.

Mr. T. H. Williams wrote me in 1932 that he would try and help me by appointing me to a position not covered by any Union Agreements, and he recommended that I keep on trying, and not attempt to have my Seniority as a Telegrapher changed from the O.R.T. Roster, and had he lived, I know I would have received such an appointment. My last work in Southern California was at Firestone Park, and I was let out at the time of the great Long Beach Earthquake in 1933, and later on I secured another place with the Virginia & Truckee Ry. at Carson City, Nevada, in 1938, which was my last Railroad work.

Los Angeles, Calif., Sept. 29th, 1942.

/s/ WALTER F. J. SHELLEY.

Railroad Retirement Board

Appeal of
Walter Francis John Shelley
R.R.B. No. A-38554

CLAIMS APPEAL DOCKET No. 206

At a regular meeting of the Railroad Retirement Board held on October 12, 1943, the Board

adopted the following statement, findings of fact, and decision in the claim of Walter Francis John Shelley, hereinafter called "appellant":

Statement

This case is before the Board on appeal from Decision No. 1623, Appeal No. 1992, of the Appeals Council dated September 29, 1941, and holding that the appellant did not on August 29, 1935, qualify as an "employee" within the meaning of the Railroad Retirement Act of 1937, 50 Stat. 307, and was not therefore entitled to an annuity based on service rendered to an "employer" prior to January 1, 1937.

As the appellant has been awarded a lump sum annuity under the Railroad Retirement Act of 1937 based on compensated service rendered after December 31, 1936, to an "employer" as defined in the 1937 Act, the issues presented on this appeal are whether he is entitled to any annuity under the Railroad Retirement Act of 1935, 49 Stat. 967, and, if not, whether he is entitled to receive credit toward an annuity under the 1937 Act for service rendered prior to January 1, 1937.

The Railroad Retirement Act of 1935 provides annuities for individuals otherwise qualified who were "employees" of "carriers" within the meaning of the Act on or after August 29, 1935. The Railroad Retirement Act of 1937 provides that an annuity may be awarded for service performed prior to January 1, 1937, only to those individuals

who were "employees" on August 29, 1935. The term "employee" as used in the 1935 Act includes individuals "in the service of" and in an "employment relation" to a "carrier" as the latter term is defined in the Railroad Retirement Act of 1935, and "representatives." As used in the 1937 Act, the term "employee" includes individuals "in the service of" or in an "employment relation" to an "employer" as the latter term is defined in the Railroad Retirement Act of 1937, and "employee representatives." The provisions of the 1937 Act superseded those of the 1935 Act with respect to all "employees" who had not relinquished their rights to return to service and become eligible for an annuity under the provisions of the 1935 Act prior to June 24, 1937, the date the 1937 Act became a law.¹ Accordingly, any individual who did not have an "employee" status on August 29, 1935, or at any time between that date and June 24, 1937, cannot be eligible for an annuity under the

¹Section 202 of the Act of June 24, 1937, provides in part that:

"The claims of individuals, (and the claims of spouses and next of kin of such individuals) who, prior to the date of the enactment of this Act, relinquished all rights to return to the service of a carrier as defined in the Railroad Retirement Act of 1935 or ceased to be employee representatives as defined therein, and became eligible for annuities under such Act, shall be adjudicated by the Board in the same manner and with the same effect as if this Act had not been enacted: * * *."

1935 Act and his claim must be adjudicated under the 1937 Act.

There is neither a claim nor evidence that the appellant was on August 29, 1935, or at any time between that date and June 24, 1937, in the active service of a "carrier" as defined in the Railroad Retirement Act of 1935 or that he was ever a "representative" as defined in that Act. Likewise there is neither a claim nor any evidence that the appellant was on August 29, 1935, in the active service of an "employer" as that term is defined in the Railroad Retirement Act of 1937 or that he was ever an "employee representative" as defined in that Act. Thus the questions to be decided are whether appellant was an "employee" by reason of being in an "employment relation" to a "carrier" between August 28, 1935, and June 24, 1937, within the meaning of the Railroad Retirement Act of 1935, and whether he was an "employee" by reason of being in an "employment relation" to an "employer" on August 29, 1935, within the meaning of the Railroad Retirement Act of 1937.

Section 1(d) of the Railroad Retirement Act of 1935 provides that:

"A person is in the employment relation to a carrier when furloughed or on leave of absence, and subject to call for service and ready and willing to serve, all in accordance with the established rules and practices usually in effect on railroads."

Section 1(d) of the 1937 Act provides that:

"An individual is in the employment relation to an employer if he is on furlough, subject to call for service within or outside the United States and ready and willing to serve, or on leave of absence, or absent on account of sickness or disability; all in accordance with the established rules and practices in effect on the employer: * * *."

In his application for an annuity filed with the Board on January 11, 1937, the appellant claimed to have been born on May 24, 1873 (which birth date has been verified) and to have performed service last in 1932 as a stenographer and typist in the freight house of the Southern Pacific Company,² hereinafter called the Southern Pacific. Prior to filing his application, in a letter dated November 14, 1936, the appellant stated that he had been employed by the Southern Pacific as agent and telegrapher and as a stenographer and that in 1931 the company laid him off with a promise that when business improved he would be re-employed and allowed all his seniority rights. Under date of December 8, 1936, he informed us in a letter that he had been laid off because he could not work as fast as younger men and he submitted at copy of a letter dated June 26, 1931, addressed

²The Southern Pacific Company is a "carrier" under the Railroad Retirement Act of 1935 and is an "employer" under the Railroad Retirement Act of 1937; accordingly, service of "employees" with that company is creditable toward annuities under the acts.

to him by the president of the Southern Pacific, to the effect that in November, 1930, the appellant had been given a "voluntary leave of absence by reason of physical disability" but that subsequent to November, 1930, "a man with greater seniority than yours has exercised his choice on the position formerly assigned to you, which has resulted in placing you on our laid-off list."

The Southern Pacific reported to the Board on December 12, 1939, that the appellant last worked for that company in November, 1930, as an auto messenger; that as of August 29, 1935, he was not recorded as on furlough, on leave of absence or absent on account of sickness or disability; and that the cause of his separation from service was "laid off account of reduction in force, seniority rights to continue 6 months under agreement with the B of R C." It was further reported:

"Mr. Shelley was not on the telegraphers seniority roster at time of his termination of service. In February, 1929, he transferred from the telegrapher-clerk seniority roster to the freight clerks roster and placed on that roster effective July 1, 1929. On July 1, 1930, his name did not appear on the roster of the telegraphers. On July 1, 1931, his name was dropped from the freight clerks roster account no service performed in past six months, this accordance with clerks agreement.

"Therefore Mr. Shelley's name did not ap-

pear on any seniority roster of this company on August 29, 1935."

In connection with the appellant's employee status as an agent-telegrapher, to the local chairman of The Order of Railroad Telegraphers, System Division No. 53, in a letter dated November 30, 1939, stated that the appellant's name appeared on the January 1, 1930, roster covering employees of that classification but that it did not appear on the seniority roster issued July 1, 1930. In view of the above information it would appear that any rights which the appellant had to return to the service of the Southern Pacific Company after November, 1930, were governed by the terms of the schedule working agreement between the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees and the Southern Pacific which was in effect on the Southern Pacific during and after November, 1930. Although the appellant has claimed to have performed service for the Southern Pacific on various dates from 1931 to 1933 he nevertheless has continued to maintain that his separation from active service was due to a lay-off on account of a reduction in forces. It is not important whether he last worked in 1930, 1931, 1932, or 1933; it is his status between August 28, 1935, and June 24, 1937, which is important.

An agreement between the Southern Pacific and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees,

effective February 1, 1922, and revised January 1, 1924, was in effect in November, 1930, and through August 29, 1935. Article VIII, Rule 41, of that agreement with respect to the abolition of positions, displacements, and reduction of force reads as follows:

“An employee whose position is abolished, or who is displaced under conditions not otherwise provided for in these rules, may within five (5) days (or if on leave of absence, within five (5) days from date of return) displace a junior employee.

“When an employee is assigned to a temporary position he may, at the conclusion of such assignment, either return to his former status, or displace a junior employee who has bid in a position during his occupancy of such temporary position.

“Employees thus displaced may displace other employees in the same manner.

“An employee laid off on account of reduction in force, or through displacement, shall have his name carried on the seniority roster without the status of an employee for six (6) months, and shall, if available within a reasonable time, be given preference in the order of seniority over other applicants when force is increased, provided employing officer is currently advised of address.”

The text of a “Memorandum of Understanding” dated at San Francisco, California, on January 21,

1931, and signed by Mr. R. E. Beach, Supervisor of Wage Schedules for the Southern Pacific, and Mr. E. A. McMillan, General Chairman, and M. F. W. Tenny, General Secretary-Treasurer, for the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, is as follows:

“1. It is agreed between the Southern Pacific Company (Pacific Lines) and all that class of clerks and other office, station and store employees represented by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees that:

“2. Employees coming within the scope of Clerks’ Agreement who have been laid off subsequent to June 30, 1930, and prior to June 30, 1931, as a result of reduction in force, and who have complied with Rule 41 of the current Clerks’ Agreement, and through the operation of the last paragraph of Rule 41 of said Agreement have lost or will lose their seniority prior to June 30, 1941, shall have their seniority carried on the seniority roster, without the status of an employee, until June 30, 1931.

“3. It is understood that this extension to the provisions of Rule 41 is agreed to due to the unusual economic situation which has prevailed during the past few months, and that the arrangement is not to be considered as establishing a precedent.”

Thus, in accordance with the terms of the above-quoted "Memorandum of Understanding" which governed the appellant's class of employees, his name was carried on the seniority roster covering that class until June 30, 1931, and he maintained rights to return to the active service of the Southern Pacific until that date.

The Regulations which we have promulgated under the Railroad Retirement Acts ("Regulations Under the Railroad Retirement Act of 1937," 4 Fed. Reg., 1477, April 7, 1939) set forth our interpretation of the employment relation provisions of both Acts. Section 204.2(a) of the Regulations provides that:

"An employment relation exists if there was, at the time in question, in effect on the employer an established rule or practice in accordance with which the individual was either (1) on furlough (subject to call for service and ready and willing to serve) or (2) on leave of absence, or (3) absent on account of sickness or disability."

The Regulations relating to the existence or non-existence of an "employment relation" under the 1937 Act apply with equal force and effect to cases under the 1935 Act except that:

"(a) Individuals absent on account of sickness or disability, as that term is used in such regulations, do not have an employment relation under the 1935 Act, and

“(b) Individuals on leave of absence, as well as individuals on furlough, are required to be subject to call for service and ready and willing to serve in order to have an employment relation under the 1935 Act.” (Sec. 204.05.)

Furlough is defined by Section 204.02(b) of the Regulations as—

“an involuntary absence from active service which is brought about by action of the employer”

with the limitation that—

“An individual on furlough can have an employment relation only if at the time in question he was subject to call for service and ready and willing to serve.”

Leave of absence is defined in Section 204.02(b) of the Regulations as—

“action of the employer permitting or requiring the employee to remain away from active service and relieving the employee from the obligations or conditions attached to active service, or to a furlough relationship or to absence on account of sickness or disability; * * *.”

Absence on account of sickness or disability is defined in Section 204.02(b) of the Regulations as—

“an interruption of active service, or of a furlough, by reason of sickness or disability.”

Section 204.02(b) of the Regulations provides also that a furlough, or a leave of absence, or an absence on account of sickness or disability, does not exist within the scope of the Regulations and of the Railroad Retirement Acts

"unless the terms of the established rule or practice in accordance with which the individual is out of active service are such that they would operate to restore him to active service upon the occurrence of definite and ascertainable events or conditions."

Finally, Section 204.02(f) of the Regulations provides that—

"The termination of an employment relation need not involve a specific action but may be inferred from circumstances. It is terminated in any case in which there has been a discharge, resignation, or retirement, with or without pension. Discharge, resignation or retirement must be determined according to the substance of the transaction, even though the transaction may have been denominated furlough, leave of absence or absence on account of sickness or disability. A transaction so denominated, but which represents in substance and effect a discharge, resignation or retirement, terminates the employment relation."

Since the appellant's rights to return to service after he ceased active service in November, 1930, were governed by the schedule working agreement

then in effect between the Southern Pacific and the railway labor organization representing his class of employees as well as the "Memorandum of Understanding" dated January 21, 1931, referred to above, it is clear that he no longer had any rights to return to the service of the Southern Pacific after July 1, 1931, and that after July 1, 1931, there was no established rule or practice in effect on the Southern Pacific in accordance with which he could have been restored to active service upon the occurrence of any definite and ascertainable event or condition. Furthermore, the action of the Southern Pacific in removing his name from the seniority roster covering his class of employees on July 1, 1931, definitely terminated any employment relationship which the appellant may have had prior to that date. (Regulations, Section 204.02(f).)

The appellant claims that after he had been laid off on account of a reduction in force he was promised that he would be reemployed and would be allowed all his seniority rights. In connection with this claim, he has submitted a photostatic copy of a letter dated October 6, 1931, addressed to him by the president of the Southern Pacific which indicates that a promise of future employment may have been made to the appellant by officials of that company. However, a promise of employment in the future would not operate to maintain an employment relation for the appellant after July 1, 1931, since it is quite clear that his employment relation within the meaning of

the Railroad Retirement Acts and the Regulations ceased at least by July 1, 1931, when his name was removed from the seniority roster governing his class of employees. Section 204.03(e) of the Regulations provides as follows on this point:

“When such rights to return to service as an individual may hold, in accordance with the established rules and practices in effect on the employer, are terminated, but in connection with such termination or coincidentally therewith, a promise not in accordance with the established rules or practices in effect on the employer is made, indicating some future employment, such promise does not operate to maintain an employment relation.”

The appellant urges that he continued to enjoy an employment relation with the Southern Pacific because he did not resign from the service of that company until some time in 1938. From a review of Section 204.02(f) of the Regulations quoted above it can be seen that resignation is not the only manner in which an employment relation under the Acts may be terminated. Thus, even though the appellant may not have tendered a formal resignation to the Southern Pacific on or before July 1, 1931, his employment connection with the company was severed when the company as of July 1, 1931, removed his name from the roster covering his class of employees.

From the foregoing it is quite clear that the appellant was not at any time between August 28,

1935, and June 24, 1937, in an "employment relation" to a "carrier" as defined in the Railroad Retirement Act of 1935; accordingly he was not an "employee" during that period within the meaning of that Act and he could not have been eligible for any annuity under the Railroad Retirement Act of 1935. It is also clear that he was not on August 29, 1935, in an "employment relation" to an "employer" as defined in the Railroad Retirement Act of 1937; accordingly he was not on that date an "employee" within the meaning of that Act.

The appellant entered the service of the Virginia and Truckee Railway³ in April, 1938, and performed compensated service for that company until June 2, 1938, at which time he resigned and relinquished all rights to return to service. As he became an "employee" of an "employer" after August 29, 1935, by entering the active service of the Virginia and Truckee Railway and attained age sixty-five in May, 1938, appellant became eligible to receive an annuity under the 1937 Act.⁴ Ac-

³The Virginia and Trukee Railway is a "carrier" under the Railroad Retirement Act of 1935 and is an "employer" under the Railroad Retirement Act of 1937; accordingly, service of "employees" with that company is creditable toward annuities under the Acts.

⁴The Railroad Retirement Act of 1937 provides annuities for individuals otherwise qualified who on or after the enactment date (August 29, 1935) were "employees" and who on or after that date were sixty-five years of age or over.

cordingly, it will be seen that we do not take the position that the appellant was not eligible for an annuity under the 1937 Act because he was not in the service of a "carrier" or of an "employer" on August 29, 1935. It is clear that he is eligible to receive an annuity under the Railroad Retirement Act of 1937, but we must look to other sections of that Act to determine the amount of an annuity to be awarded to him.

Section 3(a) of the 1937 Act, which explains the method in which an annuity may be computed, provides as follows:

"The annuity shall be computed by multiplying an individual's 'years of service' by the following percentages of his 'monthly compensation': 2 per centum of the first \$50; 1½ per centum of the next \$100; and 1 per centum of the next \$150."

and Section 3(b) states in part that the "years of service" of an individual shall be determined as follows:

"(1) In the case of an individual who was an employee on the enactment date, the years of service shall include all his service subsequent to December 31, 1936, and if the total number of such years is less than thirty, then the years of service shall also include his service prior to January 1, 1937, but not so as to make his total years of service exceed thirty: * * *." (Underscoring ours.)

"(2) In all other cases, the years of service shall include only the service subsequent to December 31, 1936."

According to Section 3(b)(1) of the 1937 Act, if the appellant is to receive credit toward an annuity under the 1937 Act for service which he performed for an "employer" prior to January 1, 1937, he must have been an "employee" on the enactment date (August 29, 1935) and this status he did not have as hereinbefore set forth. Furthermore, in accordance with Section 3(b)(2) of the 1937 Act quoted above, unless he was an "employee" on that date, we are expressly prohibited from including in his "years of service" any service other than that which he rendered to an "employer" after December 31, 1936.

The appellant claims that he should receive credit for all service rendered by him whether rendered before or after January 1, 1937, and bases his claim on the decision rendered on May 6, 1935, by the United States Supreme Court in the case of Railroad Retirement Board et al. v. Alton Railroad Co. et al., 295 U. S. 330. He relies on that part of the opinion which reads as follows (page 349):

"In addition to the 146,000 who left the service during the year preceding the passage of the Act, over 1,000,000 persons have been but are not now in the employ of the carriers. The statute provides that if any of them is reemployed at any time, for any period, how-

ever brief, and in any capacity, his prior service with any carrier shall be reckoned in computing the annuity payable upon his attaining 65 years of age."

It should be borne in mind that the opinion of the United States Supreme Court in that case was rendered with respect to the Railroad Retirement Act of 1934, a full two years before the Railroad Retirement Act of 1937 became a law and could not possibly have had reference to the 1937 Act nor could it have been an interpretation of the provisions of the 1937 Act. Nor could that decision have had reference to the Railroad Retirement Act of 1935 as that Act was not approved until August 29, 1935. As the appellant knows, the Railroad Retirement Act of 1934 was held unconstitutional by that decision. The appellant's rights to an annuity must be determined in accordance with the provisions of the Railroad Retirement Acts which were thereafter enacted by Congress.

The appellant further claims that he was promised certain pension rights under a company pension plan in effect on the Southern Pacific and that from 1903 on, certain monthly deductions were made from his salary by that company in accordance with such plan. Whether or not this appellant has any right to a pension under any pension plan in effect on the Southern Pacific is a question which this Board has no jurisdiction to determine under the provisions of the Railroad Retirement Acts.

The appellant was not, on August 29, 1935, an "employee" within the meaning of the Railroad Retirement Act of 1937, and since he was not an "employee" on that date he may not receive credit toward his annuity for any service performed by him prior to January 1, 1937. His annuity must be computed entirely on service performed by him subsequent to December 31, 1936.

On the basis of all the evidence of record we make the following:

Findings of Fact

1. The appellant was born on May 24, 1873.
2. The appellant last rendered service to the Southern Pacific in November, 1930.
3. In accordance with the terms of the schedule working agreement governing his class of employment in effect on the Southern Pacific during the period from November, 1930, through August 29, 1935, his status as an employee was terminated by July 1, 1931.
4. On July 1, 1931, the appellant's name was removed from the seniority roster covering his class of employees.
5. In accordance with the terms of the established rules and practices providing for furloughs for employees of appellant's classification in effect on the Southern Pacific during the period from November, 1930, through August 29, 1935, the ap-

pellant held no rights to return to the service of the Southern Pacific after July 1, 1931.

6. The appellant was not at any time between August 28, 1935, and April, 1938, in the active service of a "carrier" within the meaning of the Railroad Retirement Act of 1935 nor of an "employer" within the meaning of the Railroad Retirement Act of 1937.

7. The appellant was not at any time between August 28, 1935, and June 24, 1937, on furlough, on leave of absence or absent on account of sickness or disability in accordance with any established rules or practices in effect on a "carrier" within the meaning of the Railroad Retirement Act of 1935 or on an "employer" within the meaning of the Railroad Retirement Act of 1937.

8. The appellant entered the active service of the Virginia and Truckee Railway, an "employer" under the Railroad Retirement Act of 1937, in April, 1938, and continued in the service of that company until June 2, 1938.

9. The appellant has been properly awarded an annuity under the Railroad Retirement Act of 1937 on the basis of service which he rendered to the Virginia and Truckee Railway.

Decision

The decision of the Appeals Council that the appellant did not qualify as an "employee" on August 29, 1935, nor at any time between that date

and June 24, 1937, and that accordingly the "years of service" used in calculating any annuity to which he may be entitled may not include any service performed by him prior to January 1, 1937, is affirmed.

The appellant is not entitled to any annuity under the Railroad Retirement Act of 1935 nor is he entitled to credit for service rendered prior to January 1, 1937, toward an annuity under the Railroad Retirement Act of 1937.

/s/ LEE M. EDDY,
Acting Chairman.

/s/ M. R. REED,
Member.

Aug. 8, 1946.

Mr. Walter Francis J. Shelley
258 North Avenue 49
Los Angeles, California

In reply refer to
R.R.B. No. A-38554

Dear Sir:

In a petition for rehearing and for review of the decision on A-38554 dated July 18, 1946, there is a statement that you were employed by the Southern Pacific Company most of the time from 1892 until sometime in the month of October, 1935. You further stated that you were actually employed by the Southern Pacific Company as Telegrapher and

Agent in charge of the station at Firestone Park, California, on August 29, 1935, and went from there to Santa Susana station in the early part of September, 1935, and about three weeks later proceeded to Ventura where you relieved the Southern Pacific Company's Agent and later the Night Telegrapher and Clerk in October, 1935.

No claim for this service has previously appeared in your file, therefore, in order that we may give consideration to this file, therefore, in order that we may give consideration to this claim, will you kindly complete and return the enclosed from G-108. If there is other service during the period from November, 1930, to October, 1935, which has not previously been claimed, please include that on this form also.

In completing this form G-108 care should be exercised in showing the particular name under which you were employed, and if payment was made to someone other than yourself, be sure to advise us concerning such payments.

Very truly yours,

JOHN W. CALLENDER,
Director of Retirement
Claims.

Aug 8, 1946.

Budget Bureau No. 70-R050

Approval Expires March 31, 1949

Form No. G-108

(8-0)

United States of America
Railroad Retirement Board

Request for Supplemental Service Information

Social Security Account Number 710-10-8543.

Claim No. A-38554

To Mr. Walter F. J. Shelley

258 North Avenue 49

Los Angeles, California.

In order to assist in establishing your railroad or other employer service, please fill out all items shown below, using a separate section for each period of service.

Section 1.

- (a) Name of Railroad or Other Employer:
Southern Pacific Company.
- (b) Date Began Service: About May, 1930.
- (c) Date Ended Service: June, 1931.
- (d) Last Occupation for This Period: Supervising Agent in Charge.
- (e) Department: Operating.
- (f) Division: Los Angeles.
- (g) Location: Niland, California (formerly Imperial Junction).

- (h) Foreman or Supervisor: Under Train Master.
- (i) Name Exactly As It Appeared on Pay Roll: Walter F. Shelley, or W. Frank Shelley.

Section 2.

- (a) Name of Railroad or Other Employer: Southern Pacific Company.
- (b) Date Began Service: About June, 1931.
- (c) Date Ended Service: Sept., 1932.
- (d) Last Occupation for This Period: Stenographer—Freight Bill Clerk.
- (e) Department: Freight Station.
- (f) Division: Los Angeles.
- (g) Location: S. P. Freight Station, Los Angeles, Cal.
- (h) Foreman or Supervisor: B. J. Van Slyck, General Foreman.
- (i) Name Exactly as It Appeared on Pay Roll: Walter F. Shelley, or W. Frank Shelley.

Section 3.

- (a) Name of Railroad or Other Employer: Southern Pacific Company.
- (b) Date Began Service: October, 1932.
- (c) Date Ended Service: About Jan. 19, 1933.
- (d) Last Occupation for This Period: Checking Perishables (Refrigerator and Other Cars).
- (e) Department: Freight Dept.

- (f) Division: Los Angeles.
- (g) Location: 8th & Alameda Sts., Los Angeles. Team Track.
- (h) Foreman or Supervisor: Chief Clerk of 8th St. Team Track.
- (i) Name Exactly as It Appeared on Pay Roll: Walter F. Shelley or W. Frank Shelley.

Please date and sign with ink or indelible pencil and return in the enclosed self-addressed envelope.

Date August 27th, 1946.

/s/ WALTER FRANCIS J.
SHELLEY.

Section 4.

- (a) Name of Railroad or Other Employer: Southern Pacific Company.
- (b) Date Began Service: Jan. 20, 1933.
- (c) Ended Service: About Feb. 20, '33.
- (d) Last Occupation for Period: Checking perishables (Refrgrs) and other cars.
- (e) Department: L. A. Frt. Station, 6th St. Team Track.
- (f) Division: Los Angeles.
- (g) Location: 6th and Alameda Sts., Los Angs.
- (h) Foreman: Chief Clerk, 6th St. Station.
- (i) Name on Pay Roll: Walter F. Shelley or W. Frank Shelley.

Section 5.

- (a) Name of Railroad or Other Employer: Southern Pacific Company.
- (b) Date Began Service: Febry 21, 1933.
- (c) Ended Svc.: About Mar. 15, '33.
- (d) Last Occupation for Period: Agent & Telegrapher.
- (e) Department: Operating.
- (f) Division: Los Angeles.
- (g) Location: Firestone Park Station, Cal.
Foreman or Supervisor: Chief Train Dispatcher.

Name exactly as appears on P. Roll: Walter F. Shelley, or W. Frank Sheley.

Section 6.

- (a) Name of Railroad or Other Employer: Southern Pacific Co.
- (b) Date Began Service: 15 March, 1934.
- (c) Ended Svc: 25 March, 1934.
- (d) Last Occupation for Period: Night Telegrapher and Clerk.
- (e) Department: Operating.
- (f) Division: Los Angeles.
- (g) Location: Firestone Park Station, Cal.
Foreman or Supervisor: Chief Train Dispatcher.

Name Exactly as Appears on Pay Roll: Walter F. Shelly or W. Frank Shelley.

Section 7.

- (a) Name of Railroad or Other Employer: Southern Pacific Company.
 - (b) Date Began Service: August 20, 1935.
 - (c) Ended Service: Sept. 9, 1935.
 - (d) Last Occupation for Period: Agent and Telegrapher.
 - (e) Department: Operating.
 - (f) Division: Los Angeles.
 - (g) Location: Firestone Park Sta., Cal.
- Foreman or Supervisor: Chief Train Dispatcher.
- (i) Name Exactly as Appears on Pay Roll: Walter F. Shelley, or W. Frank Shelley.

Dated August 27th, 1946.

/s/ WALTER FRANK J.
SHELLEY.

Section 8.

- (a) Name of Railroad or Other Employer: Southern Pacific Company.
- (b) Date Began Service: September 10, 1935.
- (c) Date Ended Service: Sept. 25, 1935.
- (d) Last Occupation of This Period: Agent and Telegrapher.
- (e) Department: Chief Train Dispatcher.
- (f) Division: Los Angeles.
- (g) Location: Santa Sussana, Cal.

Foreman or Supervisor: Chief Dispatcher.

Name as Exactly Appears on Pay Roll: Walter F. Shelley or W. Frank Shelley.

Relieved Mr. C. R. Sims, Agent, while on vacation.

Section 9.

- (a) Name of Railroad or Other Employer: Southern Pacific Company.
- (b) Date Began Service: October, 1935.
- (c) Date Ended Service: Nov. 21, 1935.
- (d) Last Occupation of This Period: Agent in Charge.
- (e) Department: Chief Train Dispatcher.
- (f) Division: Los Angeles.
- (g) Location: Ventura, Cal.
- (h) Foreman or Supervisor: Chief Train Dispatcher.
- (i) Name as exactly appears on Pay Roll: Walter F. Shelley, or W. Frank Shelley.

Relieved Agent, Mr. Murphy for leave.

Section 10.

- (a) Name of Railroad or Other Employer: Southern Pacific Company.
- (b) Date Began Service: Nov. 21, 1935.
- (c) Date Ended Service: Dec. 1, 1935.
- (d) Last Occupation of This Period: Night Telegrapher & Clerk.
- (e) Department: Operating.
- (f) Division: Los Angeles.
- (g) Location: Ventura, Cal.
- (h) Foreman or Supervisor: Chief Train Dispatcher.

Name as Exactly Appears on P. Roll: Walter F. Shelley or W. Frank Shelley.

I went to some places to work for the Company in meantime, but can't state where, but was working as Relief or Employee.

/s/ **WALTER FRANCIS J.
SHELLEY.**

Date August 27th, 1946.

Sept. 4, 1946.

Mr. J. S. Cunningham, Secretary
Board of Pensions

Southern Pacific Company
65 Market Street
San Francisco 5, California

In reply refer to
R.R.B. No. A-38554

Dear Sir:

This has reference to the application for an annuity which had been filed by Mr. Walter Francis John Shelley, concerning which we have had considerable previous correspondence.

The information previously furnished indicated that this applicant was last employed by your company in 1931, and that his rights to recall to service were terminated by a furlough limitation.

The applicant has now made additional claims for

service which have not been considered, and we are therefore enclosing Form AA-2P to enable you to recheck his service and to determine whether this service can be verified.

You will note that one period of service covers the interval from August 20, 1935, to September 9, 1935, therefore, will you kindly furnish us with a completed Form ERR-8 if this applicant was employed during this period, but was not in active service on August 29, 1935.

Very truly yours,

JOHN W. CALLENDER,
Director of Retirement
Claims.

Form No. RR-22
(2-4)

United States of America
Railroad Retirement Board

Forms and Documents on Carrier Special Annuity Applications
(To be submitted by employer)

The forms and documents indicated below, which are required in connection with the above employee's application for annuity, will be forwarded to your office.

(1) Social Security Account No. 710 - 10 - 8543

Name of Applicant

Walter Francis John Shelley

Date September 23, 1946

R. R. B. No. A-38554

You are requested to forward to this office the forms and documents indicated below, which are required in connection with the above employee's application for annuity.

Name of Employer Southern Pacific Company

Signature and title of designated carrier employee

/s/ J. S. CUNNINGHAM,

Secretary Board of Pensions.

Approx. Date
of Submission
(If attached, specify)
Attached

Remarks

See my letter December 12, 1939 transmitting completed form ERR-8 in this case.

To Bureau of Retirement Claims:

The forms and documents indicated above will be submitted by the employer through the field office, and are not to be requested from the employer or the applicant.

Type of
Document
Form AA-2P
Form ERR-8

Social Security Account No. 710 - 10 - 8543
 R. R. B. No. A-38554

Record of Employee's Prior Service

Section 1.—Identification

Concerning prior service claimed under the Railroad Retirement Act by—

(Last name) Shelley (First name) Walter (Middle name) Francis John
 258 North Avenue 49 Los Angeles California

who states that he served with the employer or its predecessor as shown in section 2 herein.

Section 2.—Employee's Claimed Service

(Employer) Southern Pacific Company

Name on pay roll	Shelley	Walter	F.	Date Began (Month, year)	Date Ended (Month, year)	Department	Location or Division
Name of Employer if Not Same as Above							
1	Same	Supervising Agent in Charge	May 1930	June 1931	Operating	Niland, Calif.	
2	Same	Stenographer- Ft. Bill Clerk	June 1931	Sept. 1932	Frt. Station	Los Angeles S.P. Frt. Sta.	
5	Same	Agent Telegrapher	Feb. 21, 1933	Mar. 15, 1933	Operating	Los Angeles Fireston Park	
6	Same	Clerk Nt. Telegrapher	Mar. 15, 1934	Mar. 25, 1934	Operating	Los Angeles Fireston Park	
7	Same	Agent Telegrapher	Aug. 20, 1935	Sept. 9, 1935	Operating	Los Angeles Fireston Park	

(on page 2)

1	Same	Agt. Telegrapher	Sept. 10, 1935	Sept. 25, 1935	Chief Train Dispatcher	Santa Susanna, California
2	Same	Agt. in Charge	Oct. 1935	Nov. 21, 1935	Chief Train Dispatcher	Ventura, Calif.
3	Same	Nt. Telegrapher Clerk	Nov. 21, 1935	Dec. 1, 1935	Operating	Ventura, Calif.

Section 3.—Birth Data

Employer's records indicate the employee was born at— London England
 Age given as 33 years, which has not been verified, and that such date of birth was entered on records of the employer during the year of 1899.

Section 4.—Status August 29, 1935

Was the employee in compensated service on August 29, 1935? No. If the answer is "No" the employer with whom service is claimed on August 29, 1935, will complete and attach form ERR-8.

Section 5.—Personnel Record

Occupation	From—	To—
Agent, Freight Clerk and Messenger	Department or Division Los Angeles Divn	Month Year Aug. 1927 Dee. 1930

Section 6.—Service Record

Employer records indicate the employee named herein received compensation in each of the months marked "C" in the following table, that his name did not appear on the pay roll or other detailed compensation records in the months marked "X," and that records for months marked "M," are not available.

	1936	1935	1934	1933	1932	1923	1922	1921	1920	1919	1918	1917	1916	1915	1914	1913	1912	1911	1910	1909
--	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------	------

Jan.			x	x																
Feb.				x	x															
Mar.			x	x	x															
April					x															
May					x															
June					x															
July					x															
Aug.					xx	x														
Sept.					xx	x														
Oct.					x	x														
Nov.					x	x														
Dec.					x	x														
Total																				

Special Instructions for August and September 1935.—Check pay roll for second half of August 1935; if name is *not* found on this pay roll, check pay roll for *first* half of August. Check pay roll for *first* half of September 1935; if name is *not* found on this pay roll, check pay roll for *second* half of September. Do not make an entry in more than one block for each of the two months.

Note.—(a) Line out spaces for all months for which entries have not been made.
 (b) Only 30 service years are required for verification.

pay roll previous instances, what his name did not appear on the pay roll or other detailed compensation record in the periods marked "X," and that records for periods marked "M," are not available.

Name on pay roll Shelley Walter F.

	Compensation						Year	Occupation	Title on Pay Roll
	1931	1930	1929	1928	1927	1926			
Jan.	x	\$63.00	\$65.20	\$80.16				1st	
	x	73.50	68.90	93.52				1931	
Feb.	x	63.00	50.00	86.84				2d	
	x	68.26	5.25	80.16					
Mar.	x	63.00	68.25	86.84				1st	Frt. Bill Typist
	x	71.20	73.50	46.76				1930	Frt. Bill Typist
Apr.	x	68.25	68.25	80.16				2d	Messgr., Distaphone Oper.
	x	68.25	68.25	86.84					
May	x	34.45	63.00	86.84				1st	Rec. & Del. Clk. Typist
	x	5.00	73.51	93.52				1929	Rec. & Del. Clk. Typist
June	x	56.25	68.25	86.84				2d	Agt.-Teleg.
	x	37.29	67.76	86.84					
July	x	60.00	68.15	73.48				1st	
	x	68.75	68.25	93.52				1928	
Aug.	x	23.75	68.25	86.84	\$34.24			2d	
	x	x	73.50	93.52	96.03				
Sept.	x	x	68.26	66.80	68.47			1st	
	x	45.00	68.25	33.40	80.41			1927	
Oct.	x	64.38	68.25	80.16	75.00			2d	
	x	70.00	68.25	66.80	106.98				
Nov.	x	25.00	68.25	86.84	100.20			1st	
	x	48.40	68.26	80.16	100.20			1926	
Dec.	x	54.60	68.25	86.84	100.20			2d	
	x	5.05	73.50	87.52	93.52				

Note.—(a) Line out spaces for all months for which entries have not been made.

(b) Enter occupation for the first pay-roll period in each half year on which the employee's name is found.

Section 10.—Certification

All information or data reported on this form in sections 3, 4, 5, 6, 7, and 9, are furnished at the request of the Railroad Retirement Board for official use and are correct to the best of my knowledge and belief. No alterations, interlineations or erasures appear in this report except as noted above under "Additional information," or as initialed by me.

/s/ J. S. CUNNINGHAM,
Secretary Board of Pensions.

Date September 23, 1946.

Note.—The official concerned shall date and sign as to the correctness of all entries.

Section 11.—Excerpts From Railroad Retirement Act of 1937

Section 10 (b) (part). * * * * The Board shall have power to require all employers and employees and any officer, board, commission, or other agency of the United States to furnish such information and records as shall be necessary for the administration of such Acts * * * ,

Section 13. "Any officer or agent of an employer, as the word 'employer' is hereinbefore defined, or any employee acting in his own behalf, or any individual whether or not of the character hereinbefore defined, who shall willfully fail or refuse to make any report or furnish any information required, in accordance with the provisions of section 10 (b) 4, by the Board in the administration of this Act or the Railroad Retirement Act of 1935, or who shall knowingly make or cause to be made any false or fraudulent statement or report when a statement or report is required to be made for the purpose of such Acts, or who shall knowingly make or aid in making any false or fraudulent statement or claim for the purpose of causing an award or payment under such Acts, shall be punished by a fine of not more than \$10,000 or by imprisonment not exceeding 1 year."

Budget Bureau No. 70-R050

Approval Expires March 31, 1949

Form No. G-108

(8-0)

United States of America
Railroad Retirement Board

Request for Supplemental Service Information

Social Security Account Number:

Claim No.: A-38554.

To: Mr. Walter F. J. Shelley
258 No. Ave 49
Los Angeles, Calif.

In order to assist in establishing your railroad or other employer service, please fill out all items shown below, using a separate section for each period of service.

Particular attention should be given to any items checked with red pencil.

Section 1.

- (a) Name of Railroad or Other Employer:
Southern Pacific Co.
- (b) Date Began Service: Fall or Winter,
1936.
- (c) Date Ended Service: Fall or Winter,
1936.
- (d) Last Occupation for This Period: En-
gine wiper and sweep roundhouse.
- (e) Department: M. E.
- (f) Division:

- (g) Location: Sparks, Nev.
- (h) Foreman or Supervisor:
- (i) Name Exactly as It Appeared on Pay Roll: Walter F. or Walter Frank Shelley.

Section 2.

- (a) Name of Railroad or Other Employer: Southern Pacific Co.
- (b) Date Began Service: Between Jan. & March, 1937.
- (c) Date Ended Service: Between Jan. & March, 1937.
- (d) Last Occupation for This Period: Stenographic-typist W/Bs & freight bills, etc.
- (e) Department: Freight traffic.
- (f) Division:
- (g) Location: Los Angeles, Cal.
- (h) Foreman or Supervisor:
- (i) Name Exactly as It Appeared on Pay Roll: Walter F. or Walter Frank Shelley.

Please date and sign with ink or indelible pencil and return in the enclosed self-addressed envelope.

Date 11-7-46.

/s/ W. F. SHELLEY.

Form No. G-563

(10-1)

United States of America
Railroad Retirement Board

Request for Data From Wage Register

Name of Employee: Walter Francis John Shelley.

Soc. Sec. Acct. No.: 710-10-8543.

Date of Birth: May 24, 1873.

Attained Age 65:

Information Is Required for the Items
Checked Below

Date of Wage Register: 1945.

Number of Months of Subsequent Service: 3
S. M. thru 1945.

Other, Specify: Service month only 1/1937 thru
12/1945.

Requested By: I. E. Nelson, employment relation.

Dated: 11/18/6.

Data Furnished By: bd.

Date: 11/20/46.

Dec. 2, 1946.

Mr. J. S. Cunningham, Secretary
Board of Pensions

Southern Pacific Company
65 Market Street
San Francisco 5, California

In reply refer to
R.R.B. No. A-38554

Dear Sir:

On September 23, 1946, you completed a Form AA-2P covering service claimed by Mr. Walter Francis John Shelley prior to December, 1935.

Mr. Shelley now states that he worked as an engine wiper, and sweeping the roundhouse from the fall of 1936 to December, 1936, at Sparks, Nevada. Since he has not previously claimed any service during 1936, it is requested that you check your records for this service and complete the attached Form AA-2P.

Your usual prompt cooperation will be appreciated.

Very truly yours,

JOHN W. CALLENDER,
Director of Retirement
Claims.

Social Security Account Number 710 - 10 - 8543
 R. R. B. No. A-38554

Record of Employee's Prior Service

Section 1.—Identification

Concerning prior service claimed under the Railroad Retirement Act by
 (Last Name) Shelley, (First Name) Walter (Middle Name) Francis
 258 North Ave. 49 Los Angeles, Los Angeles County Calif.
 who states that he served with the employer or its predecessor as shown in Section 2 herein.

Section 2.—Employee's Claimed Service

(Employer) Southern Pacific Company

Name on pay roll	Shelley, Walter Frank	Date Began (month, year)	Date Ended (month, year)	Department	Location or Division
Name of Employer if Not Same as Above	Occupation				
1 Same	Engine Wiper	Fall 1936	Dec. 1936	M. of E.	Sparks, Nevada
2	Sweep				
	Roundhouse				

Section 6.—Service Record

Employer records indicate the employee named herein received compensation in each of the months marked "C," in the following table, that his name did not appear on the pay roll or other detailed compensation records in the months marked "X," and that records for months marked "M" are not available:

	1936	1935	1934	1933	1932	1923	1922	1921	1920	1919	1918	1917	1916	1915	1914	1913	1912	1911	1910	1909
Jan.																				
Feb.																				
Mar.																				
April																				
May																				
June																				
July																				
Aug.																				
Sept.											x									
Oct.											x									
Nov.											x									
Dec.											x									
Total																				

Special Instructions for August and September, 1935: Check pay roll for second half of August 1935; if name is not found on this pay roll, check pay roll for *first* half of August. Check pay roll for *first* half of September 1935; if name is *not* found on this pay roll, check pay roll for *second* half of September. Do not make an entry in more than one block for each of the two months.

- Note.—(a) Line out spaces for all months for which entries have not been made.
 (b) Only 30 service years are required for verification.

Section 10.—Certification

All information or data reported on this form in Sections 3, 4, 5, 6, 7 and 9, are furnished at the request of the Railroad Retirement Board for official use and are correct to the best of my knowledge and belief. No alterations, interlineations or erasures appear in this report except as noted above under "Additional information," or as initialed by me.

Date December 28, 1946.

Note:—The official concerned shall date and sign as to the correctness of all entries.

/s/ H. E. ALSING
 Chief Clerk, Secretary Board of Pensions.

Jan 13 1947

Mr. Walter Francis J. Shelley
258 North Avenue 49
Los Angeles, California

In reply refer to
R.R.B. No. A-38554

Dear Sir:

This will acknowledge your letter of December 28, 1946, regarding your application for an annuity pursuant to the Railroad Retirement Act.

We have investigated the additional service that you have claimed, and have made every effort to verify same. However, the Southern Pacific Company reported that they have no record of the service which you claimed from Fall of 1936 through December 1936.

It is noted in a memorandum dated November 8, 1946, from our field representative in Los Angeles that you have communicated with the treasury department of the company in San Francisco, inquiring as to whether they might have a check receipt sheet or any other information establishing that you received payment for the additional service claimed.

In order that a final determination may be expedited, please furnish this Bureau with any further information you may have to substantiate your claim.

Further adjudication will not be made on your

application until your reply to this letter has been received.

Very truly yours,

John W. Callender

Director of Retirement
Claims

Jan 22 1947

Mr. Walter Francis John Shelley
258 North Avenue
Los Angeles 49, California

In reply refer to
R.R.B. No. A 38554

Dear Sir:

Reference is made to your application for an annuity pursuant to the Railroad Retirement Act and your letters of recent date.

An amendment to the Act of 1937 which was approved on July 31, 1936, re-defined the term "employment relation." Under this amendment an individual is generally considered to have an employment relation on August 29, 1935, under any of the following conditions:

(1) If he was on August 29, 1935, on a leave of absence from his employment which was expressly granted to him by his employer and that leave of absence is proved to the satisfaction of the Board before July 1, 1947.

(2) If he returned to service after August 29,

1935, and worked in at least six different calendar months before January 1, 1946.

(3) If he did not retire and was not retired or discharged before August 29, 1935, but

(a) he had stopped work before August 29, 1935, because of disability and continued to be disabled until age 65 or until August 1, 1945, whichever event first occurred; or

(b) he was not called back to service between August 28, 1935 and August 1, 1946, because of disability; or

(c) he was called back to service between August 28, 1935 and August 1, 1945, but was unable to work in at least six different calendar months before January 1, 1946, because of disability.

As stated in our letter of January 13, 1947, we have investigated and made every effort to verify additional service that you have claimed with the Southern Pacific Company. Before we can request that the company make a recheck in your case, it will be necessary that you furnish this office with further evidence of your service, setting forth all pertinent information relative thereto such as exactly where you worked and by whom you were paid. It is also requested that any evidence such as pay vouchers, time books, or documents of similar nature be furnished, if possible.

We have been able to verify that you rendered three months of service subsequent to August 29, 1935. If you have additional service to claim and further information to substantiate same, it is requested that you submit this data at the earliest

practical date in order that a final determination may be expedited in your case.

Further adjudication will be made on your application when the above requested information has been received.

Very truly yours,

John W. Callender

Director of Retirement
Claims

Sparks, Nevada, May 16, 1945

To Whom It May Concern:

Some years ago and I am quite sure that it was during the early part of 1936, Mr. W. F. Shelly whom we had known as agent at Wabuska, Nevada, called upon us in this office and claimed that he was seeking employment as a telegrapher.

Yours truly,

/s/ A. D. Radcliffe

Southern Pacific Company, Manager Telegraph
Office, Sparks, Nevada

Southern Pacific Company

Southern Pacific Passenger Station, Reno, Nevada
Phone Dial 7183.

A-38554

T. Bergerson,
District Freight & Passenger Agent,
Reno, Nevada.

May 6th 1945.

To whom it may concern:

This is to certify that in the early part of the year 1936, I conferred with Mr. W. F. Shelley at Reno on his visit to the station, apparently seeking employment with our Company at that time.

Yours very truly,

T. Bergerson,

Feb 18 1947

Mr. J. S. Cunningham, Secretary,
Board of Pensions
Southern Pacific Company
65 Market Street
San Francisco 5, California

In reply refer to
R.R.B. No. A-38554

Dear Sir:

Reference is made to the application for an annuity pursuant to the Railroad Retirement Act filed by Mr. Walter Francis John Shelley, who was for-

merly employed as an agent-telegrapher in the operating department, California Division.

Prior to the approval of the 1946 amendments to the Act, the Bureau of Retirement Claims made the determination that Mr. Shelley did not have an employment relation on the basis of the report furnished by your company that he last performed service Nov. 25, 1930, and that he ceased having any seniority rights upon the expiration of a furlough period of six months.

Mr. Shelley appealed our decision and the case was taken into court. Before the court, the claimant introduced new evidence resulting in the case being dismissed in order that proper investigation of such evidence could be made. Inasmuch as we are now endeavoring to make a final determination in accordance with the amended employment relation provisions of the Act, considerable correspondence has transpired between the applicant and this Bureau. Excerpts from statements on file made under oath in the United States District Court, Southern District of California, follow:

Q. Proposed by Mr. Shelley who prosecuted in his behalf: Do you remember the last time I worked here [Firestone Park] in 1935?

A. Witness: You were here in 1933 and once or twice as a relief agent after that date in 1934 and 1935.

* * *

Q. Proposed by Mr. Shelley: Do you remember the time that I was there?

A. Witness: In 1933.

Mr. J. S. Cunningham R.R.B. No. A-38554

Q. I was there how long?

A. 1933 to 1935, three years.

Q. Do you remember what kind of work I did at Firestone Park?

A. Telegrapher and general station work.

Q. Do you know what I did down there; who I relieved?

A. The night man, the night telegrapher and clerk.

* * *

Q. Proposed by the Board: Do you remember what day it was he relieved you?

A. Witness: Just about September 10th.

Q. What year? A. 1935.

* * *

Q. Proposed by the Board: Please state the month and year Mr. Shelley worked at Ventura.

A. Witness: About October 1935.

The applicant has claimed further service with your company as set forth below:

Night Telegrapher from November 21, 1935 to December 1, 1935, operating department Ventura, California.

Engine Wiper and sweep roundhouse between fall 1936 and winter 1936, N of E department Sparks, Nevada.

Stenographer between January 1937 and March 1937, freight traffic department Los Angeles, California.

Three months of subsequent service claimed by

the applicant with the Virginia and Truckee Railway Company have been verified by our Bureau of Wage and Service records. Thus, it is necessary that the claimant be credited with only three months of additional service performed after August 29, 1935, in order that an employment relation may be established in his case.

A recent memorandum from our Field Representative in Los Angeles states that Mr. Shelley has communicated with the treasury department of your company in San Francisco, inquiring as to whether they might have a check receipt sheet, to establish that he received payment for the additional service claimed. The Board has no knowledge that your company made a reply to the applicant's inquiry to date; however, we realize the possibility that Mr. Shelley may have been paid by the individuals whom he may have relieved and therefore, his name would not appear on the pay rolls.

In view of the information summarized in this letter, it is requested that a thorough investigation be made in order to verify the additional service claimed by the applicant. The enclosed Form AA-2P should be returned with a definitive annotation thereon under section 9.

Your continued cooperation in this matter will be greatly appreciated.

Very truly yours,

John W. Callender

Director of Retirement
Claims

Aug. 29, 1947

Mr. Walter Francis John Shelley
258 North Avenue
Los Angeles 49, California

In reply refer to
R.R.B. No. A-38554

Dear Sir:

This has reference to your application for an annuity, pursuant to the Railroad Retirement Act.

In order to be eligible to receive an annuity under the Act, based in whole or in part upon service performed prior to January 1, 1937, it is necessary, in addition to meeting certain other requirements regarding age, service or disability, that an individual qualify as an employee by having been on August 29, 1935, in the active compensated service of, or in an employment relation to, an employer as defined in the Act.

The Railroad Retirement Act of 1937 was amended on July 31, 1946, changing the definition of the term "employment relation." Under these amendments, an individual shall be deemed to be in an employment relation on August 29, 1935, if he fulfills one of the three following provisions:

1. He was on that date on leave of absence from his employment, expressly granted to him by the employer by whom he was employed, or by a duly authorized representative of such employer, and the grant of such leave of absence will have been established to the satisfaction of the Board before July 1947.

2. He was in the service of an employer after the enactment date and before January 1946 in each of six calendar months, whether or not consecutive.

3. Before the enactment date he did not retire and was not retired or discharged from the service of the last employer by whom he was employed, or its corporate operating successor, but

(a) solely by reason of his physical or mental disability he ceased before the enactment date to be in the service of such employer and thereafter remained continuously disabled until he attained age sixty-five or until August 1945, or

(b) solely by reason of his mental or physical disability, an employer by whom he was employed before the enactment date or an employer who is its successor did not, on or after the enactment date and before August 1945, call him to return to service, or

(c) if he was so called, he was solely for such reason unable to render service in six months as provided above.

We regret to advise that you do not qualify in accordance with any of the foregoing, inasmuch as the Southern Pacific Company reported that you were furloughed on account of reduction in force November 25, 1930; that your record was closed in May 1931 when you lost all seniority rights upon the expiration of a six-month furlough period

under the agreement in effect with the labor organization concerned; and that you did not, therefore, maintain any rights to a position on August 29, 1935. We requested this carrier to make a careful search of their records in an effort to obtain verification of the additional service claimed by you after August 29, 1935 at Ventura and Los Angeles, California, and Sparks, Nevada. An extensive investigation conducted by the Southern Pacific Company, involving the perusal of their pay rolls, disclosed that your name does not appear thereon for the periods which you have claimed. Since you could not exercise any rights to a position with an employer in the railroad industry on the enactment date, the only provision under which you could have qualified as having an employment relation would have been condition 2 set forth herein. The Virginia and Truckee Railway Company reported that you rendered only 3 months of service in the year of 1938. As this is all the subsequent service that could be established for you by this Bureau, we have no alternative other than to hold that you do have an employment relation within the meaning of the Act as you did not perform service in 6 different calendar months between August 29, 1935 and January 1, 1946.

On the basis of the evidence in your case and the provisions of law outlined above, the Bureau of Retirement Claims has no alternative other than to hold that you did not have an employment relation on August 29, 1935, and are ineligible to receive

credit for service performed prior to January 1, 1937. Therefore, the full amount of the annuity benefits to which you are entitled is the lump-sum payment of \$20.47 that was based on the service that you performed after December 31, 1936, which was awarded to you as per our explanatory letter of September 30, 1939.

You have a right to appeal to the Appeals Council of the Board if you do not agree with the decision on your claim. An appeal must be submitted on the form provided by the Board and must be received at an office of the Board within one year from the date of this letter.

Very truly yours,

JOHN W. CALLENDER,
Director of Retirement
Claims.

Nov. 6, 1947

Mr. Walter Francis John Shelley
258 North Avenue
Los Angeles 49, California

In reply refer to
R.R.B. No. A-38554

Dear Sir:

This will acknowledge receipt of your letter dated October 17, 1947, expressing dissatisfaction with the decision of the Bureau of Retirement Claims on your claim for benefits under the Railroad Retirement Act.

If it is your desire to file an appeal from the decision of the Bureau of Retirement Claims, it is necessary that you execute and file the enclosed Form AC-1. A copy of the Board's appeal regulations is also enclosed.

If you wish, you may appear before the Appeals Council in person or by representative to present your case. If you desire such a hearing, please so state at the time you file your appeal. If you do not wish a hearing, all evidence and information you may have to support your appeal should be forwarded to the Railroad Retirement Board with Form AC-1. Unless a request for a hearing is received, the Council will proceed to a final determination of your claim upon receipt of Form AC-1.

Very truly yours,

JOHN W. CALLENDER,
Director of Retirement
Claims

Dec. 23, 1947

Mr. Walter Francis John Shelley
258 North Avenue
Los Angeles 49, California

In reply refer to
R.R.B. No. A-38554

Dear Sir:

Reference is made to your letter of December 6, 1947 concerning the service you performed before January 1, 1937.

As requested, we are enclosing another copy of Form AC-1. A copy of the Board's appeal regulations is also enclosed. The decision of the Bureau of Retirement Claims in your case is contained in our letter of August 29, 1947.

If you wish, you may appear before the Appeals Council in person or by representative to present your case. If you desire such a hearing, please so state at the time you file your appeal. If you do not wish a hearing, all evidence and information you may have to support your appeal should be forwarded to the Railroad Retirement Board with Form AC-1. Unless a request for a hearing is received, the Council will proceed to a final determination of your claim upon receipt of Form AC-1.

Very truly yours,

/s/ GORMAN,

JOHN W. CALLENDER,
Director of Retirement
Claims

Mar. 10, 1948

Mr. J. S. Cunningham, Secretary
Board of Pensions

Southern Pacific Company
65 Market Street,
San Francisco 5, California

In reply refer to
R.R.B. No. A-38554

Walter Francis J. Shelley

Dear Sir:

Reference is made to your letter of August 8, 1947 concerning the case of Walter Francis John Shelley and to our letter of February 18, 1947.

Your letter of August 8, 1947 states that records were checked at Ventura, California and at Sparks, Nevada but it does not indicate whether a check was made of the records at Firestone Park, California. Mr. Shelley claims the service outlined on the enclosed Form AA-2P. He also claims that he was in compensated service on August 29, 1935.

Since this claim is in an appeal status, it would be appreciated if you would check the claim outlined on the enclosed Form AA-2P at the earliest possible date.

Very truly yours,

/s/ GORMAN,

JOHN W. CALLENDER,
Director of Retirement
Claims

April 14, 1948

Mr. John W. Callender
Director of Retirement Claims
Railroad Retirement Board
844 Rush Street
Chicago 11, Illinois

Dear Sir:

Referring to your letter of March 10, 1948, concerning annuity application A-38554 of Walter Francis J. Shelley.

While Mr. Shelley claims service as Agent-Telegrapher at Firestone Park, California, during the years 1934 and 1935, we are unable to locate such an Agency on our pay rolls during those years. We are now having our Superintendent at Los Angeles investigate the matter, and it is hoped that we can make a reply to your letter within the next ten days or two weeks.

Yours very truly,

/s/ J. S. CUNNINGHAM,

Social Security Account No. 710 - 10 - 8543

R. R. B. No. A-38554

Record of Employee's Prior Service

Section 1.—Identification

Concerning prior service claimed under the Railroad Retirement Act by—

(Last name) Shelley (First name) Walter Francis (Middle name) John
258 North Avenue 49 Los Angeles 42 Los Angeles County California

who states that he served with the employer or its predecessor as shown in section 2 herein.

Section 2.—Employee's Claimed Service

(Employer) Southern Pacific Company

Name on pay roll Shelley W. Frank

Name of Employer if Not Same as Above	Occupation	Date Began (Month, year)	Date Ended (Month, year)	Department	Location or Division
1 Same	Telegrapher Agent	1934	9-1935		Firestone Park, California

Section 6.—Service Record

Employer records indicate the employee named herein received compensation in each of the months marked "C" in the following table, that his name did not appear on the pay roll or other detailed compensation records in the months marked "X," and that records for months marked "M" are not available:

	1936	1935	1934	1933	1932	1923	1922	1921	1920	1919	1918	1917	1916	1915	1914	1913	1912	1911	1910	1909
Jan.	x																			
Feb.		x	x																	
Mar.		x	x																	
April		x	x																	
May		x	x																	
June		x	x																	
July		x	x																	
Aug.		x	x																	
Sept.		x	x																	
Oct.		x	x																	
Nov.		x	x																	
Dec.		x	x																	
Total																				

Special Instructions for August and September 1935.—Check pay roll for second half of August 1935; if name is *not* found on this pay roll, check pay roll for *first* half of August. Check pay roll for *first* half of September 1935; if name is *not* found on this pay roll, check pay roll for *second* half of September. Do not make an entry in more than one block for each of the two months.

Note.—(a) Line out spaces for all months for which entries have not been made.

(b) Only 30 service years are required for verification.

Section 9.—Additional Information

1. Applicant's name could not be located on Los Angeles Division, Transportation Department pay rolls during period claimed. Am enclosing copy of letter from Mr. H. R. Gernreich, Superintendent of this Company at Los Angeles, indicating that Mr. Shelly was not employed during period in question.

Section 10.—Certification

All information or data reported on this form in sections 3, 4, 5, 6, 7, and 9, are furnished at the request of the Railroad Retirement Board for official use and are correct to the best of my knowledge and belief. No alterations, interlineations, or erasures appear in this report except as noted above under "Additional information," or as initiated by me.

/s/ J. S. CUNNINGHAM,
Secretary Board of Pensions.
Date April 26, 1948

Note.—The official concerned shall date and sign as to the correctness of all entries.

LA PR

Los Angeles, April 21, 1948

Mr. J. S. Cunningham:

Your letter of April 14th in connection with the retirement of Walter Francis Shelley:

In December, 1946, a careful check was made of our pay rolls covering the month of August and September 1935, which failed to reveal that Mr. Shelley performed any service for this Company during either of these months and he was so informed by letter December 17, 1946.

Firestone Park was under the jurisdiction of Los Angeles Agent and position was filled during this period by R. Riggs. Mr. Shelley also claimed to have worked at Santa Susana during September, 1935, but this position was filled during the entire period by R. C. Sims.

There is nothing in our files to indicate that he performed any service for this Company after being cut off in November, 1930.

/s/ H. R. GERNREICH.

Copy

November 29, 1948.

Mr. Walter Francis J. Shelley
258 North Avenue 49
Los Angeles 42, California

In reply refer to
R.R.B. No. A-38554

Dear Sir:

Enclosed is a copy of the decision of the Appeals Council in the above-styled case.

It is regretted that a more favorable decision cannot be rendered.

Very truly yours,

HALBERT W. DODD,
Chairman, Appeals Council.

Enclosure

Copy to: Mr. Charles B. McGinnis, Esq.
318 Fay Building
126 West Third Street
Los Angeles, California

HWD:DA

[Endorsed]: No. 12411. United States Court of Appeals for the Ninth Circuit. Walter Francis John Shelley, Petitioner, vs. United States of America Railroad Retirement Board, Respondent. Appendix to Brief of Respondent. (Excerpts from Transcript of Record.) Petition for Review of Decision of the United States of America Railroad Retirement Board.

Filed December 2, 1949.

/s/ PAUL P. O'BRIEN,

Clerk of the United States
Court of Appeals for the Ninth
Circuit.